

"Balance" on the Supreme Court

In raising concerns about the nomination of Judge Robert Bork to be Associate Justice of the United States Supreme Court, some have suggested that, whatever the nominee's other qualifications, it might be appropriate for a Senator to oppose Judge Bork's nomination on the ground that it would affect the "balance" on the Supreme Court. This is a theme developed by Professor Laurence H. Tribe of the Harvard Law School. This novel argument is at odds with the history of Supreme Court appointments since the beginning of the Republic.

- The United States Constitution nowhere specifies that any particular "balance" is to be permanently maintained on the Supreme Court. Opposing a particular nominee because the nominee would alter the "balance" on the Court is merely a veiled way of saying that one disagrees with the philosophical direction in which a nominee would move the Court. Whatever the propriety of opposing a nominee because of philosophical differences, this should not be confused with an objection of "imbalancing" the Court.
- The constitutional reason for rejecting this so-called "balance" test is clear: If the Senate tried to preserve the narrow balances of the present Court on, e.g., criminal procedure or administrative law, it would undermine the constitutionally-guaranteed independence of the Supreme Court. The Senate would have to interrogate any prospective nominee on his position regarding such issues. To preserve each of these competing balances would subject the Senate to sharply conflicting demands. This politicization would plague the confirmation process far into the future.
- Nor does the historical practice surrounding Senate confirmation of Supreme Court nominees suggest that the present "balance" between liberals and conservatives must be maintained when a new nominee is proposed for a vacancy. The Senate historically has not adhered to a "balance standard" in assessing Presidents' judicial appointments. Certainly no such standard was employed in evaluating Franklin Delano Roosevelt's eight nominations to the Court, or Lyndon Johnson's nominations to the Warren Court, even though, as Professor Laurence Tribe has written, Justice Black's appointment in 1937 "took a delicately balanced Court...and turned it into a Court willing to give solid support to FDR's initiatives. So too, Arthur Goldberg's appointment to the Court in 1962 shifted a tenuous balance on matters of personal liberty toward a consistent libertarianism...."

- A variant of the "balance" argument is the argument that the Supreme Court should not undergo rapid changes in direction. Because the Supreme Court is a collegial body consisting of nine individuals, however, it is unlikely that there will be major changes in the direction of the Court except in those areas in which there are fairly recent 5-4 votes. In any event, any change in the direction of the Court would be tempered substantially by adherence to the principle of stare decisis.
- If the argument were accepted that existing "balances" on the Court should be respected, it is difficult to see how such High Court decisions as Plessy v. Ferguson ("separate but equal") could ever be reversed by such subsequent decisions as Brown v. Board of Education.
- In the 1960s, when Justices Goldberg, Fortas, and Marshall were being placed on the Supreme Court -- resulting in a body that consisted of (at best) two judicial conservatives -- the "balance" theory was never raised. Presumably, the "balance" theory has nothing to say when a judicial philosophy is so predominant on the Court that an additional appointment, rather than shifting the "balance," will merely solidify the dominance of an existing "balance."
- The "balance" theory is delinquent also in its pure result-orientation, assuming that judges are always predictable in their opinions on the basis of their personal, philosophical perspectives. If Judges--both "liberal" and "conservative" ones--were to confine themselves to interpreting the law as given to them by statute or Constitution, rather than injecting their own personal predilections, there would be no need to worry about "balance on the Court."
- In reality, there is always going to be a "balance" on the Court and there is always going to be a Justice who best approximates the center of that balance. If Justice Powell does not represent the balance, then it will be represented by someone else who falls in the middle on a particular issue or class of issues. To opine that a nominee will be opposed because he will upset the "balance" on the Court is merely another, not-very-subtle way of saying that one simply opposes any movement by the Court in the direction of the new Justice nominee.
- Judge Bork's appointment would not change the balance of the Court. His opinions on the Court of Appeals--of which, as previously noted, not one has been reversed--are thoroughly in the mainstream. This is manifested by the fact that Judge Bork has voted with

the majority on the Court of Appeals 94% of the time. In every instance, Judge Bork's decisions are based on his reading of the statutes, constitutional provisions, and case law before him. A Justice who brings that approach to the Supreme Court will not alter the present balance in any way.

- It is ironic that Judge Bork is accused simultaneously of being "outside the mainstream" and capable of moving the Court in a variety of unsatisfactory directions. Judge Bork, if elevated to the Court, would need the concurrence of at least four of his colleagues in order to achieve a Court majority on any issue. If Judge Bork is "outside the mainstream," then so are at least four other members of a Court comprised of six Justices confirmed by near-unanimous margins and two other Justices (Marshall and Rehnquist) confirmed by sizeable margins.

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ROBERT BORK'S ROLE IN THE "SATURDAY NIGHT MASSACRE"

On Saturday, October 20, 1973 Robert Bork was thrust into the center of the Watergate affair when he acted upon President Nixon's order to fire Special Prosecutor Archibald Cox. The task fell to Solicitor General Bork when Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus refused to fire Cox and resigned.

As the only remaining official in the line of succession who could serve as Acting Attorney General, Bork determined that it was necessary to carry out the President's command in order to preserve institutional integrity of the Justice Department. He convinced top officials that they should not resign and immediately took steps to insure that the Special Prosecution task force would remain intact and independent. Following the Saturday Night Massacre, Bork convinced President Nixon that he must appoint Leon Jaworski as the second Special Prosecutor with full guarantees of independence.

The Decision to Fire Cox

Bork had not taken part in the lengthy negotiations with Cox over whether President Nixon would turn over all of his White House tapes. Prior to Saturday evening, Bork had only been tangentially involved in giving advice to Elliot Richardson on the jurisdiction of the Special Prosecutor. On October 20, when the negotiations fell through and Cox held a press conference to announce he would challenge the President in court to obtain the tapes, Richardson called Ruckelshaus and Bork into his office to discuss what could be done.

The three of them agreed that since there was no statutory restriction the President had the power to dismiss Archibald Cox as an executive employee. Richardson told Ruckelshaus and Bork that he could not carry out the order to fire Cox because he had made a promise to the Senate at his confirmation hearing that the Special Prosecutor would be independent. At that point, Bork realized that he may be called upon to fire Cox. When Ruckelshaus said that he, too, felt bound by the commitment to the Special Prosecutor, Bork weighed the alternatives. Richardson made it clear that the President was going to insist that Cox be fired one way or another. If Bork did not carry out the order, there would be no one left in the line of authority and the Department would be decimated as the White House sought an official to carry out the President's order. Because he had been appointed before Richardson, Bork was not bound by the same commitment to Cox.

Sense of Duty to Justice Department Leads Bork to Fire Cox

Bork suggested that he could fire Cox and then resign himself to show that he was not an "apparatchik" who acted merely to save

his own job. Both Richardson and Ruckelshaus told Bork he should not resign because his presence was needed to preserve the Department of Justice. They assured Bork they would publicly back his decision to stay.

Richardson met with the President. President Nixon said the Middle East was about to erupt into another conflict and that the Soviet Union was taking advantage of his perceived weakness to threaten U.S. activities. President Nixon suggested that Richardson should fire Cox in order to demonstrate to the Soviets that Nixon was in charge and resign in a week when the Middle East situation had cooled down. Richardson stated that he would not fire Cox and told the President he would resign immediately. Chief of Staff Alexander Haig then called Ruckelshaus who also refused to follow the President's order.

That same day, Bork agreed to come to the White House where he signed the letter drafted by White House Counsel dismissing the Special Prosecutor. Bork spoke briefly with Richard Nixon who asked him if he wanted to be Attorney General. Bork declined indicating it would be inappropriate and returned to the Justice Department.

Ensuring That the Watergate Prosecution Continues

When Bork returned to the Justice Department, Richardson and Ruckelshaus urged him to stay on as Acting Attorney General. Bork indicated he would and immediately called Criminal Division Assistant Attorney General Henry Petersen and other top Department officials to urge them to stay. Petersen agreed to remain and was put in charge of the investigation. Haig had requested that the top lawyers in the Special Prosecution task force also be fired, which Bork refused to do. Instead, he called Cox's Deputy, Philip Lacovara, to assure him that the task force employees would continue the investigation as Justice Department employees.

The next day Bork held a meeting with Henry Petersen, Philip Lacovara and Henry Ruth, another Deputy to Archibald Cox, to discuss the status of the Watergate prosecution. Ruth and Lacovara reported that in two to four weeks they would complete some investigations, but that others would take more time and would require more evidence from the White House. Bork assured Lacovara and Ruth that they would have complete independence in continuing the investigation, including the right to go to court to obtain whatever evidence they needed.

Bork Selects Leon Jaworski As Special Prosecutor

During the next three weeks, Bork convinced President Nixon that another Special Prosecutor had to be appointed. He began an extensive search for the right person -- someone who had

experience in prosecuting criminal actions and was well known in the legal community. Ultimately, Bork convinced President Nixon to accept his selection -- Leon Jaworski. Nixon agreed that he would not dismiss Leon Jaworski or diminish his jurisdiction, even in extreme circumstances, without first obtaining a consensus from the "group of eight," consisting of the Senate and House Majority and Minority leaders and the Chairmen and ranking minority member of the Senate and House Judiciary Committees. At Bork's insistence, Leon Jaworski was granted the same charter as Archibald Cox with the additional Presidential guarantees.

The rescission of the regulations granting Cox independent prosecution authority was challenged by Ralph Nader in the D.C. District Court. Judge Gesell entered an order declaring the rescission to be illegal, because the grant of independence implied a requirement that Cox consent to any rescission. (Judge Gesell later vacated this order on mootness grounds at the direction of the D.C. Circuit Court of Appeals.) Ralph Nader was dismissed as a plaintiff and no relief was granted the other plaintiffs because they had no standing.

Although at the time Bork bore the brunt of criticism for the "Saturday Night Massacre," commentators have since credited him for saving the Justice Department through his strong leadership in time of crisis. He carried out the President's order to fire Cox, while at the same time he preserved the Watergate investigation and protected the prosecutors from political pressure, thereby ensuring that justice was served.

THE FIRST AMENDMENT IN GENERAL

Judge Bork's first amendment cases suggest a strong hostility to any form of government censorship, as his cases on broadcast regulation and libel demonstrate. At the same time, he has been open to upholding the validity of reasonable government regulation of conduct if not directed at the suppression of free speech. In extremely limited circumstances, he has found that the government has a compelling interest in adopting narrowly drawn content-based laws, especially in the matters touching foreign relations.

* The hostility that Judge Bork has directed toward government efforts to censor speech in his broadcast regulation and libel cases is repeated in Lebron v. Washington Metropolitan Transit Authority, 749 F.2d 893 (D.C. Cir. 1984), which held that the Washington Metropolitan Transit Authority (WMATA) violated Michael Lebron's first amendment rights by refusing to let him hang a poster extremely critical of President Reagan in space leased for advertisements on the inside of subways. Judge Bork reasoned that the poster clearly represented political speech, that WMATA's decision was a judgment about the content of the message, and that WMATA's refusal to display it amounted to a prior restraint on free speech. Noting that the first amendment reflects the distaste that free people have for censorship, Judge Bork applied a heavy burden of justification on WMATA, placing "the thumb of the [c]ourt . . . on the speech side of the scales." Judge Bork, following Justice Stevens' majority opinion in Bose Corp. v. Consumers Union, stated that an appellate court must exercise independent judgment to determine that there has been no intrusion on protected speech, and he rejected WMATA's contention that the poster was deceptive and therefore should not be displayed.

* Judge Bork's opinion in Brown & Williamson Tobacco Corp. v. FTC, 778 F.2d 35 (1985), joined by Judges Scalia and Edwards, also demonstrates his hostility to any form of censorship. Notably, this case involved commercial speech and thus clearly demonstrates that Judge Bork no longer believes that the first amendment protects only "political" speech. The Brown & Williamson opinion vacated an injunction restricting a cigarette company's ability to engage in certain kinds of advertising without prior FTC approval, and remanded to the district court to enter a less restrictive injunction. Although Judge Bork upheld the district court's conclusion that the tobacco company had engaged in false and deceptive advertising of milligram tar figures for its cigarettes, he found that the trial court's remedy violated the first amendment by potentially prohibiting certain kinds of advertisement that would not be deceptive. The painstaking analysis that led to the injunction's dissolution shows that Judge

Bork will not accept even the slightest degree of censorship absent extremely compelling circumstances.

* Judge Bork has also shown that he will not strike down reasonable government regulations on conduct simply because of an incidental and content-neutral restriction on speech. For example, in CCNV v. Watt, 703 F.2d 586 (1984), a majority of the en banc court held that the National Park Service had violated the first amendment by not permitting demonstrators to sleep in Lafayette Park to dramatize the plight of the homeless. Judge Bork, on the other hand, joined Judge Wilkey's dissent, holding that the regulations prohibiting sleeping in parks were constitutional. Drawing on Justice Harlan's opinion for the Supreme Court in O'Brien, the dissent reasoned that these regulations governing conduct were permissible in that they served a substantial governmental interest (preventing damage to the parks from camping), that the interest sought to be protected was unrelated to the suppression of free speech, and that the restriction on speech was no greater than necessary to serve that interest.

* In an opinion by Justice White, the Supreme Court in Clark v. CCNV agreed with the dissent and, relying on the O'Brien test, upheld the National Park Service's regulation prohibiting camping, reversing the en banc majority of the D.C. Circuit.

* Juluke v. Hodel, 811 F.2d 1553 (1987) is another CCNV case similarly upholding a government regulation of conduct not directed at the suppression of particular ideas. The case involved a challenge to regulations governing the conduct of demonstrations (e.g., the size and construction materials of placards) and the placement of parcels on the sidewalk in front of the White House. Judge Bork joined Judge Edwards' opinion holding that the regulations amounted to a content neutral time, place, and manner restriction that was narrowly drawn to serve the legitimate government interest of security, traffic flow, and aesthetics.

* In the same line of cases must be put American Postal Workers v. U.S. Postal Service, 764 F.2d 858 (1985), in which Judge Bork joined Judge Edwards' opinion holding that a post office is not a public forum, and that the "Postal Service's interest in avoiding the appearance of involvement in the political process [was] reasonably served by restricting on-premises [voter] registration to clearly non-partisan organizations." This opinion follows the Supreme Court's Hatch Act decisions, such as United Public Workers v. Mitchell (per Justice Reed) and Civil Service Commission v. Letter Carriers (written by Justice White and joined by Chief Justice Burger and Justices

Stewart, Blackmun, Powell, and Rehnquist). It also anticipated by two weeks the Supreme Court's 1985 decision in Cornelius v. NAACP Legal Defense & Education Fund, written by Justice O'Connor and joined by Chief Justice Burger and Justices White, Powell, and Rehnquist.

* Judge Bork's opinion in Finzer v. Barry, 798 F.2d 1450 (1986), shows that, while hostile to government regulation of speech as such, he is not completely unwilling, in extremely limited circumstances, to find certain government interests sufficiently weighty to justify some narrowly drawn suppression of speech, especially in matters involving foreign relations. In that case, protesters wanting to demonstrate in front of the Nicaraguan and Soviet embassies challenged a D.C. ordinance prohibiting hostile demonstrations within 500 feet of a foreign embassy. Judge Bork acknowledged that this amounted to both content and viewpoint discrimination because only hostile demonstrations were proscribed, and that the government had to bear the heavy burden of showing that the law was necessary to achieve a compelling state interest and was narrowly drawn to achieve this result. He found that the law was narrowly tailored to the government's compelling interest in fulfilling the nation's international obligations to foreign diplomats under the law of nations. After exhaustively reviewing the legal and historical background of the treatment of foreign emissaries under the law of nations back to the colonial era, Judge Bork concluded that the Founding generation "understood that the protection of foreign embassies from insult was one of the central obligations of the law of nations." Relying on such Supreme Court opinions as Chicago & Southern Air Lines v. Waterman Steamship Co. (per Justice Jackson), Harisiades v. Shaughnessy (per Justice Jackson), Banco Nacional de Cuba v. Sabbatino (per Justice Harlan), and Regan v. Wald (per Justice Rehnquist), Judge Bork also stated that the court had to give considerable deference to the judgment of the political branches because "[d]efining and enforcing the United States' obligations under international law will inevitably color our relationships with other nations." He concluded that these sensitive, delicate, and complex decisions are inappropriate for judicial resolution and that courts should defer to the political branches. The Supreme Court has granted certiorari in Finzer and will hear it next Term.

* In his dissent in Abourezk v. Reagan, 785 F.2d 1043 (1985), Judge Bork relied directly on Justice Blackmun's majority opinion in Kleindienst v. Mandel to reject the appellant's claim that the first amendment forbids the executive from excluding aliens based on their political beliefs. Judge Bork also disputed appellants' contention that the aliens in Abourezk were being excluded because of

the content of their political beliefs, and noted that the government had instead chosen to exclude them on the basis of their affiliation with certain foreign governments.

* In a valuable contribution to first amendment jurisprudence, Judge Bork has also indicated that the government does not violate the first amendment when it adds its official voice to the political debate. In Block v. Meese, 793 F.2d 1303 (1986), Judge Bork joined Judge Scalia's opinion holding that a government regulatory program did not violate the first amendment by labelling some foreign films "political propaganda." The plaintiffs' claim was that this labelling carried negative connotations and violated the first amendment by acting as an "indirect deterrent" on exhibitors. The panel, which included Judge J. Skelly Wright, concluded unanimously that, even assuming that "propaganda" bears negative connotations, it is permissible for the government "to identify an objective category of speech with which the public disagrees," because the government may have a voice in the marketplace of ideas. The Supreme Court, in an opinion by Justice Stevens, joined by Chief Justice Rehnquist and Justices Powell, White, and O'Connor, upheld the challenged law this past Term in Meese v. Keene.

* Judge Bork has also exhibited a willingness to take new approaches on the first amendment. In Ollman, he relied on the changing realities of libel litigation to conclude that it was necessary to have greater first amendment protections for the press in that context. In Loveday and TRAC, while he adhered to Supreme Court precedent, he showed a healthy skepticism of the Supreme Court's Red Lion case upholding broadcast content regulation. And in CCNV v. Watt, besides joining Judge Wilkey's dissent, he joined Judge Scalia's dissent arguing that sleep is simply not speech and that a law not directed at the communicative aspect of conduct should be upheld under a mere rationality test. (The Supreme Court in Clark v. CCNV treated sleeping as "symbolic speech").

NONPOLITICAL SPEECH PROTECTED BY THE FIRST AMENDMENT

It is not true that Judge Bork would extend the protection of the first amendment only to political speech.

* To be sure, in his widely discussed article, Neutral Principles and Some First Amendment Problems, Bork took the position that the application of neutral principles suggests that "Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic."

* However, Bork has since changed his views. In the January 1984 edition of the American Bar Association Journal, Judge Bork responded to a criticism of his 1971 article as follows: "As it happens, Jamie Kalven's summary of my views is both out of date and seriously mistaken. I do not think, for example, that First Amendment protection should apply only to speech that is explicitly political. Even in 1971, I stated that my views were tentative and based on an attempt to apply Prof. Herbert Wechsler's concept of neutral principles. As the result of the responses of scholars to my article, I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection. I have repeatedly stated this position in my classes. I continue to think that obscenity and pornography do not fit this rationale for protection."

* Indeed, in the 1971 article itself, Bork expressly qualified his statements at the time by saying, "These remarks are intended to be tentative and exploratory. Yet at this moment I do not see how I can avoid the conclusions stated."

* Moreover, on the appellate court, Judge Bork has repeatedly extended first amendment protection to nonpolitical speech in contexts not governed by Supreme Court precedent. These cases have involved commercial speech (Brown & Williamson Tobacco), scientific speech (McBride), cable television "must-carry" regulations that affected many forms of speech (Quincy Cable).

* Of course, as a general matter, Bork has demonstrated extraordinary solicitude for speech and journalistic freedom (Ollman, TRAC, Loveday), indeed, to an extent exceeding colleagues such as Scalia, Wald, and Edwards (Ollman).

DEFAMATION: OLLMAN v. EVANS

Judge Bork's cases in the area of defamation law share a clearly defined theme of solicitude for journalistic freedom and a powerful resistance to legal rules that would effectively impose a regime of common law censorship on the press by creating the possibility of lawsuits brought for harassment value by targets of journalistic criticism.

* Most notable among the cases demonstrating this philosophy is Judge Bork's concurring opinion in Ollman v. Evans, 750 F.2d 970 (1984) (en banc). The facts of Ollman centered on allegedly defamatory statements made by Evans and Novak in a column criticizing a Marxist history professor and, particularly, describing him, among other things, as being "without status" in his profession.

* In a separate concurring opinion, joined by Judges Ruth Bader Ginsburg, George MacKinnon, and Malcolm Wilkey, Judge Bork concluded that the plurality opinion by Judge Starr had misapplied a four-factor test to find that certain assertions of fact were instead opinion. He argued nonetheless that the political speech at issue was protected under the first amendment. In so doing, Judge Bork concluded the plurality's analysis relied on a "rigid doctrinal framework . . . inadequate to resolve the sometimes contradictory claims of the libel laws and the freedom of the press."

* Judge Bork's opinion amply demonstrates a willingness and ability to apply core principles placed in the Constitution by the Framers to situations that, because of changing circumstances, they could not have foreseen. Thus, his analysis was informed, in his words, by a concern that "in the past few years, a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards, has threatened to impose a self-censorship on the press which can as effectively inhibit debate and criticism as would overt governmental regulation that the first amendment would most certainly prohibit."

* Judge Bork's opinion in this case makes clear that he rejects a crabbed view of original intent that would not, for example, "adapt the fourth amendment to take account of electronic surveillance, the commerce clause to adjust to interstate motor carriage, or the first amendment to encompass the electronic media." Rather, "it is the task of a judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know. . . . Doing what I suggest here does not require courts to take account of social conditions or practical considerations to any greater extent than the Supreme Court has routinely done in such cases as Sullivan. Nor does the analysis even approach

the degree to which the Supreme Court quite properly took such matters into account in Brown, 347 U.S. at 492-95, 74 S. Ct. at 690-92. "

* Specifically, Judge Bork concluded that the context of and totality of circumstances surrounding the statement about Professor Ollman made it clear that the allegedly defamatory remark amounted to constitutionally protected "rhetorical hyperbole" uttered in the course of political debate. He therefore concluded that the case could not go to a jury. Judge Bork added that Professor Ollman's conduct had placed him in the political arena, and that he had to expect some buffeting around.

* Judge Bork's opinion in Ollman was the subject of a scathing dissent by Judge Scalia, joined by Judges Wald and Edwards, who asserted that the statement made by Evans and Novak was "a classic and coolly crafted libel." He specifically criticized Judge Bork's attempt to adapt libel law to contemporary circumstances, stating that the concurring opinion had "embark[ed] upon an exercise of, as it puts it, constitutional 'evolution,' with very little reason and very uncertain effect upon the species." Judge Scalia believed instead that Judge Bork's concern with the problems of developing libel law were better left to legislatures. During Judge Scalia's confirmation hearings for the Supreme Court, it was noted that Judge Scalia took a more restrictive view of first amendment liberties than did Judge Bork in this case.

LABOR LAW

Judge Bork's open-mindedness and impartial approach to principled decision-making are vividly demonstrated by his rulings in the labor law area, where he evidences a scrupulous regard for the rights of unions and their members, often ruling against the United States government in the process.

- In United Scenic Artists v. NLRB, Judge Bork joined an opinion which reversed the Board's determination that a secondary boycott by a union was an unfair labor practice, holding that such a boycott occurs only if the union acts purposefully to involve neutral parties in its dispute with the primary employer.

- Similar solicitude for the rights of employees is demonstrated by Northwest Airlines v. Airline Pilots Int'l, where Bork joined Judge Edwards' opinion upholding an arbitrator's decision that an airline pilot's alcoholism was a "disease" which did not constitute good cause for dismissal.

- Another opinion joined by Judge Bork, NAACP v. Donovan, struck down amended Labor Department regulations regarding the minimum "piece rates" employers were obliged to pay to foreign migrant workers as arbitrary and irrational.

- A similar decision against the Government was rendered in National Treasury Employees Union v. Devine, which held that an appropriations measure barred the Office of Personnel Management and other agencies from implementing regulations that changed federal personnel practices to stress individual performance rather than seniority.

- In Oil Chemical Atomic Workers Int'l v. NLRB, Judge Bork joined another Edwards opinion, reversing NLRB's determination that a dispute over replacing "strikers" who stopped work to protest safety conditions could be settled through a private agreement between some of the "strikers" and the company because of the public interest in ensuring substantial remedies for unfair labor practices.

- In Donovan v. Carolina Stalite Co., Judge Bork also reversed the Federal Mine Safety and Health Review Commission, holding that a state gravel processing facility was a "mine" within the meaning of the Act and thus subject to civil penalties.

- In an opinion he authored for the court in United Mine Workers of America v. Mine Safety Health Administration, Judge Bork held on behalf of the union that the Mine Safety and Health Administration could not excuse individual mining companies from compliance with a mandatory safety standard, even on an interim basis, without following particular procedures and ensuring that the miners were made as safe or safer by the exemption from compliance.

- In concurring with an opinion authored by Judge Wright in Amalgamated Clothing and Textile Workers v. National Labor Relations Board, Judge Bork held that despite evidence that the union, at least in a limited manner, might have engaged in coercion in a very close election that the union won, the National Labor Relations Board's decision to certify the union should not be overturned nor a new election ordered.

- In Musey v. Federal Mine Safety and Health Review Commission, Judge Bork ruled that under the Federal Coal Mine and Health and Safety Act the union and its attorneys were entitled to costs and attorney fees for representing union members.

- In Amalgamated Transit Union v. Brock, Judge Bork, writing for the majority, held in favor of the union that the Secretary of Labor had exceeded his statutory authority in certifying in federal assistance applications that "fair and equitable arrangements" had been made to protect the collective bargaining rights of employees before labor and management had actually agreed to a dispute resolution mechanism.

- Black v. ICC, a per curiam opinion joined by Judge Bork, held that the ICC had acted arbitrarily and capriciously in allowing a railroad to abandon some of its tracks in a manner that caused the displacement of employees of another railroad.

THE CIVIL RIGHTS RECORD OF ROBERT BORK

* Both as an appellate court judge and Solicitor General, Judge Bork has consistently advanced positions that grant minorities and females the full protection of civil rights laws.

* As Solicitor General of the United States and as a member of the Court of Appeals, Bork has never advocated or rendered a judicial decision that was less sympathetic to minority or female plaintiffs than was the position ultimately adopted by either a majority of the Supreme Court or by Justice Powell. In a number of significant cases, Bork advocated a broader interpretation of civil rights laws than either Justice Powell or the Supreme Court was willing to accept. (Of course, this does not include cases challenging the constitutionality or permissibility of federal statutes or policies, where the Solicitor General is obliged to advocate interest of the United States as a defendant.)

* It has been suggested that Judge Bork may be less sympathetic to affirmative action than was Justice Powell. This assumption is based on Bork's criticism, while a law professor, of Justice Powell's opinion in the Bakke case, which authorized racially preferential treatment in certain circumstances. (Judge Bork has not had occasion to issue any rulings in affirmative action cases while a federal judge.) Thus, any claim that Judge Bork is less sympathetic to "civil rights" than Justice Powell can logically refer -- at most -- solely to this one issue and rest wholly upon comments made several years ago. In all other respects, particularly in the voting rights area, the record demonstrates that Judge Bork has taken a more or at least as expansive view of civil rights laws than has Justice Powell.

* Notable examples of cases in which Judge Bork has more broadly interpreted civil rights laws than the Supreme Court and/or Justice Powell include:

- Sumter County - In this extended voting rights litigation, Judge Bork joined an opinion which ruled that a county in South Carolina failed to show that its adoption of an at-large system had "neither the purpose nor effect of denying or abridging the right of black South Carolinians to vote."

- In a number of landmark civil rights cases, Solicitor General Bork argued for expansive interpretations of civil rights laws that were not accepted by the Court. In Beer v. United States, 425 U.S. 130 (1976), General Bork argued that a New Orleans, Louisiana reapportionment plan would dilute black voting strength, but the Court disagreed by a 5-3 vote (Justice Powell did not participate). In General Electric Co. v. Gilbert, 429 U.S. 125 (1976), Judge Bork's amicus brief argued that discrimination on the basis of pregnancy violated Title VII of the 1964 Civil Rights Act, but six justices, including Justice Powell, rejected this argument. Judge Bork also unsuccessfully argued in Washington v. Davis, 426 U.S. 229 (1976), that an employment test with a discriminatory "effect" was unlawful under Title VII, with Justice Powell again disagreeing. Similarly, in Teamsters v. United States, 431 U.S. 324 (1977), the Supreme Court and Justice Powell rejected Bork's argument that even a wholly race-neutral seniority system violated Title VII if it perpetuated the effects of prior discrimination.

* In the two cases where Judge Bork has explicitly or implicitly interpreted a civil rights statute in a manner different than minority or female plaintiffs, the Supreme Court and Justice Powell have at least substantially agreed with Judge Bork's construction of the statute. See Vinson v. Taylor, 760 F.2d 1330 (1985); Meritor Savings Bank v. Vinson, 54 U.S.L.W. 4703 (June 19, 1986); Paralyzed Veterans v. CAB, 752 F.2d 694 (1985); Paralyzed Veterans v. Department of Transportation, 54 U.S.L.W. 4855 (June 27, 1986).

* As Solicitor General, Bork also managed to achieve very significant victories for minorities and females in such landmark cases as:

- Runyon v. McCrary, 427 U.S. 160 (1976), which affirmed that civil rights laws (Sec. 1981) applied to racially discriminatory private contracts;

- United Jewish Organization v. Carey, 430 U.S. 144 (1977), which held that race-conscious electoral redistricting to enhance minority voting strength was permissible under the Fourteenth Amendment and Fifteenth Amendment;

- Lau v. Nichols, 414 U.S. 563 (1974), which established, albeit temporarily, that Title VI and

possibly the Fourteenth Amendment reached actions with only a discriminatory effect, even absent any discriminatory intent;

- Title VII cases such as Teamsters, supra; Franks v. Bowman Transportation Co., 424 U.S. 747 (1976); Albermarle County v. Moody, 422 U.S. 405 (1975), which established far-reaching rules which significantly eased the burden on plaintiffs in proving claims of employment discrimination on the basis of statistical evidence and discriminatory effects, as well as receiving full relief for any such violations.

* Bork has continued to vigorously ensure full protection of the civil rights laws as a judge on the D.C. Circuit, where he has joined or authored opinions that established, for example, that the military branches are subject to judicial review of civil rights claims involving the selection of senior officers subject to Senate confirmation, that the State Department's Foreign Service was subject to the Equal Pay Act, that female stewardesses may not be paid less than male pursers in jobs that are nominally different, that back pay awards under the Equal Pay Act should be determined by figuring a woman's total experience and that inferences of intentional discrimination can arise from statistics alone. See Emory v. Secretary of Navy; Palmer v. Schultz; Laffey v. Northwest Airlines; Ososky v. Wick.

* Bork has always emphasized his "abhorrence of racial discrimination" and repeatedly praised the correctness and wisdom of the Brown decision. His prior opposition to the 1964 Civil Rights Act was not in any way premised on resistance to the principle of equal opportunity, but on concerns that these laws probably exceeded Congress' Commerce Clause authority and constituted legislating morality at the cost of personal freedom. In any event, Bork has long ago emphatically repudiated any opposition to the civil rights laws governing private conduct and has repeatedly demonstrated throughout his public career that he will fully enforce and uphold these laws.

JUDGE BORK'S POSITION ON BROWN v. BOARD OF EDUCATION

Judge Bork has repeatedly and consistently maintained the correctness of the Supreme Court's decision in Brown v. Board of Education. For example, in a 1968 article in Fortune, Bork wrote:

The history of the Fourteenth Amendment, for example, does indicate a core value of racial equality that the Court should elaborate into a clear principle and enforce against hostile official action. Thus the decision in Brown vs. Board of Education, voiding public-school segregation laws, was surely correct.

Similarly, in his well-known Neutral Principles article, Professor Bork took up Professor Herbert Wechsler's challenge to rest the Brown decision on neutral and general principles:

A court required to decide Brown would perceive two crucial facts about the history of the fourteenth amendment. First, the men who put the amendment in the Constitution intended that the Supreme Court should secure against government action some large measure of racial equality. That is certainly the core meaning of the amendment. Second, those same men were not agreed about what the concept of racial equality requires. . . . The Court cannot conceivably know how these long dead men would have resolved these issues had they considered, debated and voted on each of them. . . .

But one thing the Court does know: it was intended to enforce a core idea of black equality against governmental discrimination. And the Court, because it must be neutral, cannot pick and choose between competing gratifications and, likewise, cannot write the detailed code the framers omitted, requiring equality in this case but not in another. The Court must, for that reason, choose a general principle of equality that applies to all cases.

Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 14-15 (1971).

Again, in a 1982 interview, Bork discussed Brown and made the following observations:

The core of the Fourteenth Amendment certainly is the core of racial equality.

The framers didn't quite know what they meant by racial equality, but in working it out in the courts, it seems to me inevitable that instead of saying that the authors of the amendment probably meant equality here but not there -- a process which is really an improper judicial function -- the Court was forced ultimately to a flat rule of no discrimination. I think that is a proper outcome for that line of cases.

Finally, in Ollman v. Evans, 750 F.2d 970, 996-97 (D.C. Cir. 1984) (en banc) (Bork, J., concurring), Judge Bork discussed Brown approvingly, stating:

We must never hesitate to apply old values to new circumstances, whether those circumstances are changes in technology or changes in the impact of traditional common law actions. Sullivan was an instance of the Supreme Court doing precisely this, as Brown v. Board of Education . . . was more generally an example of the Court applying an old principle according to a new understanding of a social situation.

Similarly, defending his consideration of the changes in the application of libel law to decide the application of the first amendment, Judge Bork stated that his analysis did not "even approach the degree to which the Supreme Court quite properly took [social conditions and practical considerations] into account in Brown."

Summary of Major Opinions by Judge Robert H. Bork

Administrative Law

Planned Parenthood Federation of America, Inc. v. Heckler, 712 F.2d 250 (1983): The issue in this case was the validity of regulations issued by the Secretary of the Department of Health and Human Services (HHS) requiring all providers of family planning services which receive funds under Title X of the Public Health Services Act (Title X): (1) to notify parents or guardians of the prescribing of contraceptives to minors; (2) to comply with state laws requiring parental notification and consent to family planning services provided to minors; and (3) to consider minors who wish to receive services on the basis of their parents' financial resources instead of their own. The court of appeals ultimately held that the notification regulation was inconsistent with Congress' intent in enacting Title X (which was enacted in part to protect confidentiality and discourage adolescent sexual relations). The regulation requiring consideration of a minor's parents' financial resources was invalidated for the same reason because it in essence required parental notification. As for the regulation requiring compliance with state laws, the court deemed that regulation an invalid delegation of authority to the states.

Judge Bork concurred in part and dissented in part. Bork agreed with the majority that HHS had no authority to promulgate the parental notification rule. This is so, Bork reasoned, because HHS's authority was claimed to be predicated on Congress' 1981 amendments to Title X which did not grant the agency authority to promulgate such a rule. As to the other two regulations, Judge Bork believed that these provisions were adopted in significant part because of HHS's adoption of the notification provision and its understanding of the meaning of Congress' 1981 amendments to Title X. Therefore, these regulations are also invalid. However, Judge Bork would have remanded the case to HHS for reconsideration because it is possible that the agency could issue the regulations under legal power different from the one initially claimed.

City of New York Municipal Broadcasting System (WNYC) v. Federal Communications Commission, 744 F.2d 827 (1984): The F.C.C. terminated a special exemption given to WNYC, a New York City-owned radio station. The termination in essence restricted WNYC's broadcast hours. After extensive hearings the F.C.C. decided that the public interest would be served by denying WNYC's alternative proposals to the termination. In a unanimous opinion authored by Judge Bork, the court of appeals held that a reviewing court may set aside an agency's determination only

where it is arbitrary, an abuse of discretion, or otherwise not in accordance with law and if the agency's factual determinations are not supported by substantial evidence. Here, the F.C.C.'s decision to terminate WNYC's special exemption was supported by substantial evidence and was reasonable since it involved the balancing of interests, an activity that is central to the function of administrative agencies.

San Luis Obispo Mothers for Peace v. United States Nuclear Regulatory Commission, 789 F.2d 26 (1986): The court of appeals sitting en banc, in an opinion by Judge Bork, faced the issue (among other minor ones) of whether the Nuclear Regulatory Commission ("NRC") was required before issuing a license for the operation of the Diablo Canyon Nuclear Power Plant (California) to hold a hearing concerning the potential complicating effects of an earthquake on responses to simultaneous but independently caused radiological accidents at the plant (even though the risk of that happening is statistically very remote). The panel of the court previously affirmed a decision by the NRC to issue licenses for the Diablo Canyon plant although it excluded from the licensing hearing evidence of the potential complicating effects of an earthquake on planned emergency responses at the Diablo Canyon facility.

The court held that it is not at liberty to set aside an agency's interpretation of its own regulations unless it is plainly inconsistent with the language of the regulations. The NRC regulation dealing with emergency planning did not require the NRC to consider potential complicating effects of earthquakes on emergency responses in deciding to license a nuclear power plant. Therefore, the NRC did not act arbitrarily and capriciously in excluding from the nuclear power plant's licensing proceedings consideration of potential complicating effects of earthquakes on emergency planning.

Jersey Central Power and Light v. FERC, 810 F.2d 1168 (1987): The court of appeals, sitting en banc, considered a federally regulated electric utility's argument that the rates it was permitted to charge by the Federal Energy Regulatory Commission were so low as to constitute an unconstitutional taking of property without just compensation. The Commission ignored this claim and refused even to grant the utility a hearing at which it could present its case. Judge Bork first heard this case as part of a three-judge panel and wrote a decision affirming the Commission's action. When a petition for rehearing was filed by the utility, Judge Bork reconsidered his position and remanded the case to the Commission for a hearing. Upon rehearing by the full court, Judge Bork wrote an opinion for the majority sending the case back to the Commission and

criticizing the Commission for its disregard of Jersey Central's constitutional right to a hearing.

Securities Industry Association v. Board of Governors, 807 F.2d 1052 (1986): This major administrative law decision upheld an action by the Federal Reserve Board permitting commercial banks to make private placements of certain investment securities (commercial paper) with small numbers of sophisticated investors on behalf of the banks' large institutional clients. The question addressed by the court was whether this action by the Federal Reserve Board was consistent with the Glass-Steagall Banking Act's complicated, ambiguous, and seemingly overlapping prohibitions and exemptions governing the permissibility of commercial banks' undertaking investment activities.

Judge Bork's opinion, joined by Judges Mikva and Edwards, exhaustively considered applicable Supreme Court precedent; the Act's language, structure, and legislative history; the history of how certain crucial terms were employed by Congress in contemporaneous securities legislation; and, to the extent necessary to discern congressional meaning, the history of commercial and investment banking. Following this careful review, Judge Bork concluded that the agency's view of the ambiguous statutory provisions was reasonable and must therefore be upheld by the court.

Antitrust

Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210 (1986): Agents of Atlas Van Lines, a nationwide carrier of household goods, brought an antitrust action contending that Atlas' adoption of a policy terminating agents for failure to adhere to company policy prohibiting agents affiliated with a particular van line from dealing with any other van line was an unlawful restraint of trade. Judge Bork, writing for the majority, held that Atlas' policy was a "horizontal restraint" for purposes of antitrust analysis and could be characterized as a boycott or a concerted refusal to deal. However, the majority noted, not all group boycotts are per se illegal. Looking at the evidence, Atlas had only six percent of the national market share and the decision or the policy of Atlas enhanced its efficiency by eliminating agents which enjoyed a "free ride" by using Atlas' reputation, equipment, facilities and services in conducting business for their own profit. Thus, the Atlas Van Lines' policy did not violate the Sherman Anti-Trust Act.

Civil Rights

Cosgrove v. Smith, 697 F.2d 1125 (1983): Male District of Columbia Code offenders - who were assigned to federal facilities as allowed under District of Columbia law - brought suit challenging the application of the revised federal parole guidelines to decisions on their parole. These parole guidelines, as a part of a court consent decree, were amended to allow female prisoners in federal facilities to be paroled under local, less harsh District of Columbia standards. The male D.C. Code offenders assigned to federal prisons challenged application of the revised federal parole guidelines to decisions on their parole. They argued that the federal scheme imposed different and harsher parole standards than the scheme enacted for the District of Columbia and applied to male D.C. offenders assigned to local facilities. They contended that this treatment exceeded the statutory mandate that the federal parole authorities have over D.C. Code offenders and that the differences of treatment (both in terms of D.C. Code offenders assigned to federal prisons and those assigned to local facilities and in terms of male and female D.C. Code offenders assigned to federal prisons) violated their constitutional right to equal protection of the laws.

The court on appeal held in part that issues of material fact existed as to whether federal and D.C. parole standards were in fact different and remanded the case to the lower court for findings of fact. Judge Bork, concurring in part and dissenting in part, agreed that remanding the case for additional evidence was proper. However, he would remand solely on the sex discrimination claim. The parole section which was not intended to prohibit disparate treatment and discrimination based on place of custody, is, moreover, rationally related to the need and opportunities for rehabilitation of prisoners in different institutions. There is accordingly no factual issue to be developed on the statutory and disparate treatment issue, Bork contended.

However, the sexual discrimination claim should survive. Bork noted that it is odd that "males in federal prisons, who previously had no valid equal protection argument because of parole standards more stringent than those applied to males in District custody, should acquire an equal protection claim because of an attempt to aid female prisoners." 697 F.2d at 1146. Yet factual issues remain as to the justification of the alleged sexual discrimination, Judge Bork noted, and he would remand the case for this factual determination.

Mosrie v. Barry, 718 F.2d 1151 (1983): A police officer brought a civil rights action alleging that his lateral transfer and public criticism of his performance by supervisory officials

deprived him of his constitutional "liberty" interest and therefore denied him "procedural due process" because a hearing was not afforded him prior to these adverse actions. In an opinion authored by Judge Bork, the court of appeals held that the police officer was not deprived of any liberty interest when he was publicly criticized prior to his being transferred, and thus he was not entitled to the due process protections before transfer.

Applying Supreme Court precedent (Paul v. Davis, 424 U.S. 693 (1976)), Judge Bork held that a deprivation of liberty must involve a removal, extinguishment or significant alteration of an interest protected under state law and that for a defamation to give rise to procedural due process protection that defamation must be accompanied by discharge from government employment or at least a demotion. Here the police officer was merely transferred laterally and any harm to his outside business interests did not amount to a change in his legal status.

Vinson v. Taylor, 760 F.2d 1330 (1985): Judge Bork dissented along with Judge Scalia and Starr from a denial for a rehearing en banc. The panel previously had held an employer liable under Title VII (Civil Rights Act) and under the legal theory of vicarious liability (indirect liability under agency principles) for sexual harassment of an employee growing out of a relationship of which the employer had no knowledge. Judge Bork stated that the case should be reheard en banc because it involved important issues of antidiscrimination law which he believed the panel wrongly decided. Specifically, among other things, Judge Bork questioned whether an employer should be held liable when an employee commits acts of sexual harassment of which the employer was unaware and which violated the employer's policies.

Demjanjuk v. Meese, 784 F.2d 1114 (1986): Petitioner John Demjanjuk sought a writ of habeas corpus, an immediate hearing, and a stay of execution of an extradition warrant. Demjanjuk had been certified as extraditable (for the murder of tens of thousands while operating the gas chambers at the concentration camp at Treblinka) to Israel pursuant to an extradition treaty between the United States and Israel and was then held by the U.S. Marshal on behalf of the Attorney General. Judge Bork denied all of Demjanjuk's requested relief.

Demjanjuk argued that the International Convention on the Prevention and Punishment of the Crime of Genocide of which the United States "will become" a party "has, or will soon" amend and nullify in part the U.S. - Israel Extradition Treaty by making genocide a domestic crime and thus not a basis for extradition. Judge Bork rejected this argument and ruled that the Convention had not been enacted and was not applicable and, even if the

Convention were in effect, extradition was here warranted on the basis of murder charges rather than on genocide. Judge Bork denied a stay of execution of the extradition warrant and a writ of habeas corpus because Demjanjuk failed to demonstrate that he was likely to prevail on the merits of his legal contentions.

Criminal Law

United States v. Mount, 757 F.2d 1315 (1985): Defendant Mount appealed from a conviction of making a false statement in an application for a passport in violation of the federal criminal code. Mount contended that the district court erred in denying his motion to suppress passports and other evidence seized by the British police as a result of the warrantless searches of his residence in England. The use of this evidence at his trial, he claimed, violated the fourth amendment's exclusionary rule. The court of appeals unanimously rejected his contentions. The principal purpose of the exclusionary rule is the deterrence of unlawful police conduct, the court reasoned, and since the United States courts cannot police world-wide law enforcement activities, the exclusionary rule does not normally apply to foreign searches conducted by foreign officials.

Judge Bork concurred. While agreeing with the majority, Judge Bork primarily addressed Mount's further contention that the evidence should be suppressed under the court's "supervisory powers," as well as on fourth amendment grounds. Relying on Justice Powell's decision for the Supreme Court in United States v. Payner, 447 U.S. 727 (1980), Judge Bork would hold that the court of appeals lacked "supervisory power to create any exclusionary rule that expands the rule the Supreme Court has created under the Fourth Amendment. . . . [and] [t]hat forecloses any exclusion of evidence seized abroad by foreign police." 757 F.2d at 1321. Those other circuits that have used their supervisory powers to suppress evidence of a foreign search secured by means which "shock the judicial conscience" have decided this issue before Payner and, consequently, should not be followed, Bork noted. Moreover, the substantive due process "shock-the-conscience" test is "wholly indeterminate and vague, and can lead to unprincipled, and ad hoc decision-making." Id. at 1323. Judge Bork wrote, "Where no deterrence of unconstitutional police behavior is possible, a decision to exclude probative evidence with the result that a criminal goes free to prey upon the public should shock the judicial conscience even more than admitting the evidence." Id.

Federalism

Franz v. United States, 707 F.2d 582 (1983) (Judge Bork's concurring and dissenting opinion reported at 712 F.2d 1428 (1983)): Pursuant to the Federal Witness Protection Program, several federal officials relocated and changed the identities of a Government informant, his wife and her three children by a former marriage, in return for the informant's testimony against alleged organized crime figures. The children's natural father brought suit against the Government on constitutional and statutory grounds and sought to re-establish contact with his children, and to obtain damages to compensate them for injuries sustained as a result of their separation. The district court dismissed the father's complaint for failure to state a claim (the complaint was not legally cognizable -- it failed to "state a cause-of-action"). The court of appeals reversed and remanded, holding that the father's complaint was valid since the Government's actions could have abrogated the father's and children's constitutionally protected rights to one another's companionship without affording the father requisite procedural protection.

Judge Bork, concurring in part and dissenting in part, agreed that the complaint should not have been dismissed but criticized the majority for passing "by the threshold legal issue in this case in order to create a new constitutional right and invent a new procedure to protect it." 712 F.2d at 1434. Assuming that the father had visitation rights granted by Pennsylvania, Judge Bork noted that the actions of the federal officials destroyed those rights and that under Pennsylvania law such a destruction might amount to a "tort (civil wrong) of interference with visitation rights." Id. at 1435. Thus, the issue in the case, Bork opined, is whether the Organized Crime Control Act (which created the Witness Protection Program) "shields the United States and defendant officers of the United States from liability," a question which Bork answered in the negative. Id.

In creating the Witness Protection Program, Congress evidenced no intent to oust state laws in this area of domestic protection, Bork noted. Family relations is "a subject that lies at the core of the police powers of the states" and so "strong has this tradition been that it was long simply a given that federal power could not touch this area of life." Id. Therefore, the majority was erroneous in implicitly assuming and inferring a congressional intent to preempt state law in this area.

Concerning the substantive due process family rights that the majority held existed, Bork noted "[i]t is not to be doubted by an inferior court that substantive due process is part of our constitutional law. The Supreme Court has made it so, and that

must be enough for us." Id. at 1438. However, Bork argued that lower courts should not go further and create without the guidance of constitutional text or structure "a new substantive right to visit [parents'] children," although such visitation might be good practice. Id.

First Amendment

Ollman v. Evans, 750 F.2d 970 (1984): Sitting en banc the court of appeals faced the issue of whether statements in a nationally syndicated news column written by Rowland Evans and Robert Novak were defamatory. In the article, Evans and Novak questioned the appointment of New York University Professor Bertell Ollman to head the University of Maryland's Department of Political Science noting that he is a Marxist and that he intends to use the classroom to propagate Marxism and also to promote Marxist approaches to politics throughout the education profession. The majority held that the challenged statements were entitled to first amendment protection since they were expressions of opinion, rather than assertions of fact.

In a concurring opinion Judge Bork rejected the rigid dichotomy between protected opinions and unprotected dissemination of facts. Fearing the "freshening stream of libel actions, which often seem as much designed to punish writers and publications as to recover damages for real injuries," 750 F.2d at 993, Bork would hold that "[t]hose who step into areas of public dispute, who choose the pleasures and distractions of controversy, must be willing to bear criticism, disparagement, and even wounding assessments," id. Judge Bork believed that Professor Ollman should not be able to press a libel action because the Evans and Novak article was nothing more than "recognizable rhetorical hyperbole" and that Ollman "placed himself in the political arena and became the subject of heated political debate." Id. at 1002. It is noteworthy that Judge, now Supreme Court Associate Justice, Scalia dissented in this case.

Lebron v. Washington Metropolitan Area Transit Authority, 749 F.2d 893 (1984): In October 1983, Mr. Lebron, an artist, sought permission from the Washington Metropolitan Area Transit Authority ("WMATA") to lease display space in subway stations to display a political poster critical of the Reagan administration. WMATA refused because in its judgement the poster was "deceptive." The lower court agreed with WMATA that the poster was deceptive and therefore was not protected by the first amendment. In an opinion authored by Judge Bork, the court of appeals held that the poster was protected by the first amendment. "There is no doubt that the poster at issue here conveys a political message; nor is there a question that WMATA

has converted its subway stations into public fora by accepting other political advertising." 749 F.2d at 897. The court termed WMATA's refusal to accept this poster for display because of its content an impermissible "prior restraint" because WMATA did not proffer a justifiable reason for its act of "censorship."

Finzer v. Barry, 798 F.2d 1450 (1986): Father R. David Finzer, National Chairman of the Young Conservative Alliance of America, Inc., and other members of that organization, sought a declaration that a provision of the District of Columbia Code that requires a permit to display within 500 feet of that country's embassy any sign tending to bring a foreign government into disrepute and makes it unlawful to congregate within 500 feet of any embassy and refuse to disperse after having been ordered to do so by the police, is violative of the first amendment. Plaintiffs stated that they wished to carry signs critical of the Soviet and Nicaraguan governments within 500 feet of their embassies.

The court of appeals, in an opinion written by Judge Bork, held for the Government defendants. The court noted that "the core of this case lies in the relationship between the United States' national interests and international obligations and the First Amendment's guarantee of free speech." 798 F.2d 1455. The court noted that it is a well accepted principle of international law that host states have a special responsibility "to ensure that foreign embassies and the personnel inside them are free from the threats of violence and intimidation" Id. Since the statute involved here is "a determination by the political branches [here Congress and the President]" it is entitled to deference by the court, especially because it involves the area of foreign relations. Id. at 1458-59. The court found the statute is narrowly drawn and restricts speech no more than necessary and is not unconstitutionally "vague" or "overbroad."

Individual Rights

Dronenburg v. Zech, 741 F.2d 1388 (1984): This case involved an appeal by James L. Dronenburg from a lower court decision upholding the United States Navy's action discharging him for homosexual conduct. Dronenburg contended that the Navy's policy of mandatory discharge for homosexual conduct violated constitutional "rights-of-privacy" and equal protection of the laws. In a unanimous opinion of the court written by Judge Bork, the court refused to extend the Supreme Court's "right-of-privacy" cases to homosexual activities. "Whatever thread of principle may be discerned in the right-of-privacy cases, we do not think it is the one discerned by appellant. Certainly the

Supreme Court has never defined the right so broadly as to encompass homosexual conduct." 741 F.2d at 1391. The court rejected the appellant's argument to extend the "right-of-privacy" beyond those privacy rights already recognized by the Supreme Court. Only substantive rights, the court contended, that are "fundamental" or "implicit in the concept of ordered liberty" would be included by the Supreme Court in the right of privacy. "We would find it impossible to conclude that a right to homosexual conduct is 'fundamental' or 'implicit in the concept of ordered liberty' unless any and all private sexual behavior falls within those categories, a conclusion we are unwilling to draw." *Id.* at 1396. The court also rejected the equal protection claim since the Navy's policy was found to be rationally related to the legitimate purpose of maintenance of military discipline, good order and morale, recruitment and the prevention of breaches of security.

Interpretivism and Role of Judiciary

Williams v. Barry, 708 F.2d 789 (1983): The court of appeals held that to comply with the Due Process Clause of the fifth amendment Washington, D.C. was required only to give notice of planned closing of shelters to homeless men and an opportunity for these men to present written comments to the city. No additional process was due the homeless men since the decision to close the shelters was "political" and the homeless had an insubstantial property interest in the shelters.

Judge Bork concurred. His opinion clearly demonstrates his view about the proper role of the judiciary in the constitutional and political process. Judge Bork noted that the Mayor is an elected official and his decision to close the shelters was entirely political. Judges, Bork opined, should not interfere with the methods by which political decisions are arrived at. Since there is no constitutional or other legal right to city-provided shelter and the decision to close the shelter was entirely political, the court should not circumscribe that political judgment by procedural requirements, he contended. "Given our legal tradition, the suggestion that there may be judicial imposition of procedures on, and review of, plainly political decisions is revolutionary. It ought to be recognized as such, lest judges grow accustomed to the suggestion that they may control any process and begin to assume powers that clearly are not theirs." 708 F.2d at 793.

Tel-Oren v. Libyan Arab Republic, 726 F.2d 744 (1984): In a per curiam opinion (a unanimous opinion joined by all members of the panel) the court of appeals affirmed the lower court's dismissal for lack of jurisdiction of a suit by mostly Israeli

citizens against Libya and the Palestine Liberation Organization (among other defendants) for a terrorist attack on a civilian bus in Israel in March, 1978. In a concurring opinion, Judge Bork noted that for the court to entertain jurisdiction "would likely interfere with American diplomacy, which is as actively concerned with the Middle East today as it has ever been." 726 F.2d at 805. Therefore, Judge Bork wrote, respect for the separation of powers principles explicit in the Constitution "provide ample reason for refusing to take a step that would plunge federal courts into the foreign affairs of the United States." Id. at 811.

Abourezk v. Reagan, 785 F.2d 1043 (1986): This case concerned the scope of authority Congress accorded the Secretary of State under the Immigration and Nationality Act of 1952 to deny non-immigrant visas to aliens who wish to visit this country, in response to invitations from United States citizens and residents, to attend meetings or address audiences here. The Government denied non-immigrant visas to two Cubans, an Italian Communist and a Nicaraguan Sandinista. Several Americans, including members of Congress, university professors, journalists, and religious leaders, argued that the exclusion of these aliens, invited by them to speak here, exceeded the Government's statutory authority and violated the plaintiff's first amendment right to engage in dialogue with these foreign individuals. The majority concluded that the lower court incorrectly analyzed the statutory construction issue and that questions of fact remained, and consequently remanded the case for further evidence.

In dissent Judge Bork would have rejected outright both plaintiff's statutory and constitutional claims. Noting that the "principle of deference applies with special force where the subject of that analysis is a delegation to the Executive of authority to make and implement decisions relating to the conduct of foreign affairs," 785 F.2d at 1063, Judge Bork would defer to the Government's interpretation of the applicable statute. Moreover, deference here is mandated by the Supreme Court's Chevron opinion, Bork reasoned. As to the first amendment challenge, Bork noted that "a potential listener who seeks a judicial declaration that the government's decision to exclude an alien is unconstitutional bears a difficult burden" because the right to listen "does not destroy the United States' sovereign power to control entry into its territory." 785 F.2d at 1074. Since the government's actions were not based on the applicants' beliefs but on membership in or connection with particular foreign governments, Bork would hold that there was no first amendment violation.

Sims v. Central Intelligence Agency, 709 F.2d 95 (1983): A Freedom of Information Act ("FOIA") suit was brought seeking disclosure by the Central Intelligence Agency ("CIA") of names of individuals and institutions under its MKULTRA program. Under FOIA an "intelligence source" is specifically exempted from disclosure by that statute. The majority held that the fact that an informant here was promised confidentiality by the CIA was not dispositive of whether the informer was an "intelligence source" under FOIA and remanded the case to the lower court to determine whether the CIA could reasonably obtain the information without promising confidentiality.

Judge Bork concurred in part and dissented in part and vigorously objected to the majority's holding because it would allow promises of confidentiality made by the CIA to be later breached on court order. "This is not an honorable way for the government of the United States to behave, and the dishonor is in no way lessened because it is mandated by a court of the United States." 709 F.2d at 103. Judge Bork's view that the majority's narrow view of the definition of "intelligence source" was erroneous was largely adopted by the Supreme Court's decision reversing this case.

Jurisdictional Doctrines

Vander Jagt v. O'Neill, 699 F.2d 1166 (1983): Republican members of the House of Representatives contended that the House Democratic leadership (and other Democrat groups) systematically discriminated against them by providing them with fewer seats on House committees and subcommittees than they are proportionately owed in violation of the fifth and first amendments. The majority of the court held that although the court had jurisdiction to hear the suit (the Republican members had "standing" or were "harmed in fact"), "prudential" considerations of separation-of-powers militated that the court refrain from adjudicating the controversy. In a concurring opinion Judge Bork would hold that the Republican members lacked standing and that therefore the court had no jurisdiction to hear the suit. Bork noted that the plaintiffs had no "judicially cognizable injury," that the litigants were not "entitled to have the court decide the merits of the dispute or of particular issues," 699 F.2d at 1177, because of "compelling reasons rooted in the concept of separation-of-powers, and in particular in the proper role of courts in relation to the political branches," id. at 1181. To do otherwise, Bork reasoned, would involve the courts in "extraordinarily intrusive" and frequent "head-on confrontations" between Congress and the federal courts. Id.

Barnes v. Kline, 759 F.2d 21 (1985): This case once again amply demonstrates Judge Bork's respect for constitutional separation-of-powers and the role of the judiciary in our constitutional system. In Barnes, the majority held that members of the House of Representatives and a member of the Senate had standing to sue the Executive Clerk of the White House and the Acting Administrator of General Services and seek declaratory and injunctive relief that would nullify the President's attempted pocket veto of certain legislation. In rejecting the majority's amorphous concept of "congressional standing," Judge Bork in a vigorous dissent wrote that such "jurisdiction asserted is flatly inconsistent with the judicial function designed by the Framers of the Constitution." 759 F.2d at 42. The consequences of the majority's expansion of standing (concrete harm) will bring "an enormous number of inter- and intra-government disputes into the Federal Court. . . ." Id. This is not just an esoteric, academic dispute, Bork writes. The requirement of standing "keeps courts out of areas that are not properly theirs. It is thus an aspect of democratic theory. Questions of jurisdiction are questions of power, power not merely over the case at hand but power over issues and over other branches of government." Id. Thus, the role of the judiciary should properly be limited to concrete "cases and controversies" as mandated by Article III of the Constitution.